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No._____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RON TONKIN GRAND TURISMO, INC.,

Petitioner,

v.

FIAT DISTRIBUTORS, INC. AND WAKEHOUSE MOTORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT FIAT DISTRIBUTORS, INC. OPPOSING THE PETITION

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QUESTION PRESENTED

Whether a small automobile distributor with a negligible share of the market violated Section 1 of the Sherman Act by refraining, at the behest of a local dealer, from appointing an additional dealer in the area.[1]

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[1]Fiat Auto International BV, A Dutch corporation, owns all of the stock of respondent Fiat Distributors, Inc. (whose name is now "Fiat Motors of North America, Inc."). Respondent has no affiliates in the United States.

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STATEMENT OF THE CASE

Petitioner's statement of the "facts" is overblown and inaccurate, and appropriately lacks supporting citations to the record. However, this is not an action for breach of contract[2] or for tortious interference with business expectations, and most of petitioner's errors and exaggerations can be ignored.

The following facts were established in the record on respondents' motions for summary judgment:

1. In the fall of 1974, Wakehouse's Fiat sales were unsatisfactory (Mixsell Dep 69-72; Mixsell Dep Exs 39, 41). As a result, when Mr. Wakehouse objected to appointing petitioner as a second dealer in Portland, Fiat's Vice President of Sales advised him by letter that Fiat would "temporarily withhold" the new dealership, but would be "free to reprospect the area provided you do not immediately increase your retail sales in both stores" (R 137; Tonkin Dep Ex 66). Wakehouse was given two successive 90-day periods in which to reach sales targets set for him by Fiat, and no action was taken on petitioner's application in the meantime (Mixsell Dep 57, 75, 80-81, 104, 111-112, 123, 234-235, 273-274). Fiat told Mr. Tonkin that it had not yet decided whether to appoint another Portland dealer (R 84, 85; Tonkin Dep 245-247; Tonkin Dep Exs 64, 68, 70). By June 1975, when the last probationary period expired, Wakehouse had reached those sales targets, and the question of appointing petitioner as a dealer was dropped (Nelson Dep 82; Mixsell Dep 112, 236, 241, 256).

2. During 1975, Fiat sales in the Portland/Multnomah County area increased from 238 to 453; Fiat's share of total foreign car sales rose from 3.51 percent to 5.2 percent, and its percentage of total automobile registrations increased from 1.04 percent to

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[2]Petitioner's dealership application executed October 18, 1974 stated that it was "not binding upon me/us nor does it obligate FIAT-ROOSEVELT MOTORS, INC. in any way to enter into a FIAT Dealer Sales and Service Agreement with me/us." Cars placed on order would be shipped "upon approval of the Application For FIAT-ROOSEVELT MOTORS, INC. Sales and Service Agreement," and the applicant's check would be returned if the application "is not approved" (R 81-83).

1.87 percent. In the market for small foreign cars (Datsun, Toyota, VW and Honda), Fiat's share of total sales rose from 5.95 percent to 8.26 percent (R 193-200).

3. There is no evidence that Fiat required petitioner to "surrender" or "relinquish" the Honda and Saab lines (Pet 2, 7). The evidence pertaining to that charge was that a Fiat representative who examined petitioner's premises said he did not want Fiats to be sold from the same floor with Hondas and Saabs. Aside from that, he did not care what Mr. Tonkin did with the Honda line (Tonkin Dep 154, 214-215).

Despite Mr. Tonkin's requests, petitioner was never authorized by Honda or Saab to sell either of those lines from the new premises (R 86; Tonkin Dep 61-63, 81, 143-149, 169-170, 349, 353; Tonkin Dep Exs 13, 21, 47, 48). Petitioner's sales of Saabs had declined from 67 units in 1971 to only 6 in 1974. As a result, Saab was unhappy and the franchise was terminated in November 1974 (Tonkin Dep 137-152, 324-325; Tonkin Dep Exs 24, 45, 49, 50, 51). In December, Mr. Tonkin arranged to transfer the Honda franchise to Ron Tonkin Chevrolet, his other agency which still sells Honda cars in Portland (R 556; Tonkin Dep 12, 67, 74-75, 81-82, Tonkin Dep Exs 17, 18, 19, 20).

REASONS FOR DENYING THE PETITION

This case, in which a small automobile distributor chose to improve its market position by stimulating a local dealer to increase sales rather than appoint an additional dealer, presents no question suitable for review by this Court. Fiat's decision could not injure intrabrand competition,[3] and the evidence showed that interbrand competition involving Fiat substantially increased in 1975. There was, therefore, no issue to try under the rule of reason. *Nat. Soc. of Professional Engineers v. U.S.*, (1978) 435 US 679.

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[3]Since 1972, Fiats have been sold by dealers in Vancouver, Washington and Gladstone, Oregon, as well as by Wakehouse (Wakehouse Dep 7, 9). In contrast, petitioner was never a Fiat dealer and had no contract to become one.

Similarly, under other established principles there could be no *per se* violation of the Sherman Act.

A. Only one Fiat dealer—Wakehouse—was involved in Fiat's decision. Petitioner was not a Fiat dealer, and Fiat's failure to make him one could have no "horizontal" effect on competition except that which attends any lawful exclusive dealership. *United States v. Arnold, Schwinn & Co.*, (1967) 388 US 365, 376; *GTE Sylvania Inc. v. Continental T.V., Inc.*, (9th Cir 1976) 537 F2d 980, 997, *aff'd* (1977) 433 US 36; cf Pet 11. This case does not involve joint action by a group of dealers or suppliers, and there is no conflict between the decision below and cases cited by petitioner which do. See *United States v. Topco Associates*, (1972) 405 US 596; *American Motor Inns, Inc. v. Holiday Inns, Inc.*, (3rd Cir 1975) 521 F2d 1230, 1242-43; *United States v. General Motors Corp.*, (1966) 384 US 127; *Associated Press v. United States*, (1945) 326 US 1.

B. A distributor's agreement with a single dealer not to appoint a competing dealer—or even to terminate an existing one—is not a "group boycott," and this Court has declined to review decisions which sustain such agreements, on facts more severe than these, as lawful vertical restraints under the rule of reason. *Oreck Corp. v. Whirlpool Corp.*, (2nd Cir 1978) 579 F2d 126, *cert den* (1978) 439 US 946, *reh den* (1979) 439 US 1104; *Joseph E. Seagram Sons, Inc. v. Hawaiian Oke Liquors, Ltd.*, (9th Cir 1969) 416 F2d 71, *cert den* (1970) 396 US 1062, *reh den* (1970) 397 US 1003.[4]

C. Petitioner's contention (Pet 8-9, 11, 12) that Fiat gave Wakehouse the right to "veto" additional dealerships in the Portland area is not supported by evidence[5] and does not affect

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[4]*Cernuto, Inc. v. United Cabinet Corp.*, (3d Cir 1979) 595 F2d 164 applies only to agreements to eliminate price competition by terminating an existing discount dealer. See *Contractor Utility Sales v. Certain-Teed Products*, (7th Cir 1981) 638 F2d 1061, 1072; *Mannington Mills v. Congoleum Industries, Inc.*, (3rd Cir 1979) 610 F2d 1059, 1070.

[5]Mr. Tonkin assertedly was told during Wakefield's probationary period that Fiat cars would be delivered to him if Mr. Wakehouse did not object

the lawfulness of Fiat's decision to let Wakehouse try to increase sales before deciding whether to appoint another dealer in Portland. Allowing a single dealer to "veto" additional distribution is not illegal *per se*. In *Quality Mercury, Inc. v. Ford Motor Co.*, (8th Cir 1976) 542 F2d 466, *cert den* (1977) 433 US 914 the court held that a complaint attacking a franchise which gave the franchisee power to veto new dealerships "in perpetuity" stated a claim under the rule of reason. The unlimited duration of the dealer's power under the contract and the allegation that there was no business reason for it were "an integral part of our analysis." 542 F2d at 471. *Quality Mercury* is not inconsistent with the Ninth Circuit's decision in this case. See also *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center,* (DDC 1970) 308 F Supp 988, *aff'd* (CA DC 1970) 429 F2d 206.

CONCLUSION

The petition presents nothing for review and should be denied.

Respectfully submitted,
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Fiat Distributors, Inc.

June 22, 1981

(R 242). The record does not show any agreement between Fiat and Wakehouse about the matter, and certainly none extending beyond the probationary period or covering other lines, such as Lancia (cf Pet 9).